

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Churchville and Keswick, Virginia and
Marlinton, West Virginia)

MB Docket No. 05-292
RM-11281

NOTICE OF PROPOSED RULE MAKING

Adopted: October 12, 2005

Released: October 17, 2005

Comment Date: December 8, 2005

Reply Comment Date: December 23, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Rule Making filed by Force 5 Communications, LLC, ("Petitioner"), licensee of Station WBOP(FM) ("WBOP"), Channel 292B1, at Churchville, Virginia. Petitioner proposes to allot Channel 292A to Marlinton, West Virginia, as its first local aural transmission service. In order to prevent this proposed allotment from being short spaced to Station WBOP, Petitioner proposes to reallocate Station WBOP, Channel 292B1, from Churchville to Keswick, Virginia, substitute Channel 291A for Channel 292B1 at Keswick, and to have its station license modified accordingly. This change in community of license will provide the first local aural transmission service to Keswick, Virginia. If the petition before us is granted, Petitioner will file an application to effectuate its change of community proposal and will also file an application for Channel 292A at Marlinton.

2. Petitioner invokes the provisions of Section 1.420(i) of the Commission's rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ The proposed use of Channel 291A at Keswick is mutually exclusive with Station WBOP's existing authorization at Churchville, Virginia.

3. Petitioner asserts that the allotment of Channel 291A to Keswick would not deprive Churchville of its sole local transmission outlet, because Churchville would continue to be served locally by AM Station WNLR. Petitioner states that the Commission's FM allotment priorities set forth in *Revision of FM*

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

*Assignment Policies and Procedures*² would be served because Petitioner would provide a first local service (priority (3) of the FM allotment priorities) at Marlinton, West Virginia³ and Keswick, Virginia.⁴ In addition, the proposed Marlinton allotment will provide a first aural reception service (priority (1) to 72 persons, a second aural reception service (priority (2) to 1,335 persons, a third such reception service to 1,001 persons, and a fourth such service to 4,200 persons. Because Petitioner's change of community proposal for Station WBOP is consistent with the provisions of Section 1.420(i) of the Commission's rules, we shall propose to modify the authorization of Station WBOP without entertaining competing expressions of interest in the use of Channel 291A at Keswick, Virginia or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

4. Since Petitioner's proposal to serve Keswick would encompass the Charlottesville, Virginia Urbanized Area with its 70 dBu contour, Petitioner is required to submit a showing pursuant to *Faye and Richard Tuck*⁵ demonstrating that Keswick is independent of that urbanized area and therefore is entitled to consideration as providing a first local service to Keswick. Petitioner has submitted a *Tuck* showing in this regard. The public is invited to comment on this showing.

5. Consistent with the technical requirements of the Commission's rules, Channel 292A can be allotted to Marlinton, West Virginia, utilizing coordinates of 38-13-24 NL and 80-05-41 WL, and Channel 291A can be allotted to Keswick, Virginia, utilizing coordinates of 38-01-48 NL and 78-22-55 WL, with a site restriction of 2.1 kilometers (1.3 miles) northwest of Keswick.

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>Channel Nos.</u>		
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Churchville, Virginia	292B1	-----

² 90 FCC 2d 88 (1982). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Equal weight is given to priorities (2) and (3).

³ The 2000 U.S. Census found that the population of Marlinton consisted of 1,204 persons. Marlinton is the county seat of Pocahontas County. Petitioner states that Marlinton is governed by a mayor and a town council and that it has its own police and fire departments.

⁴ It appears that Petitioner has submitted sufficient data to indicate that Keswick is a community to which an FM channel can be allotted. Nevertheless, it is unclear how Petitioner estimated the population of Keswick. Volume 2: Index of the 2005 Randy McNally Commercial Atlas & Marketing Guide states that Keswick is a Rand McNally & Co. Designated Place whose estimated population is about 200 people. Petitioner states that the total population of Keswick, including the urban and rural portions of Keswick, consists of 3,668 persons. Petitioner needs to clarify the means by which it estimates the population of Keswick, since Keswick is not included in the 2000 U.S. Census.

⁵ *Faye and Richard Tuck*, 3 FCC 5374 (1988) ("*Tuck*"); see also *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) (a reallocation proposal providing a first local service must submit a showing pursuant to *Tuck* when the proposed 70 dBu contour will encompass more than 50 percent of an Urbanized Area).

Keswick, Virginia	_____	291A
Marlinton, West Virginia	_____	292A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before December 8, 2005, and reply comments on or before December 23, 2005, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioner's counsel, as follows:

David G. O'Neil, Esq.
Rini Coran, PC
1501 M Street, N. W.
Suite 1150
Washington, D.C. 20005

9. Parties must file an original and four paper copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary.** Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. *See* 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁶ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition,

⁶ See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

11. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments: Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.